Religious Officials as Marital Counselors in Court-Connected Conciliation: Are there First Amendment Concerns?

After World War II divorce rates increased at what many considered an alarming rate.[1] Searching for a means to reduce the number of divorces, or to provide aid for families in distress, legislatures began to experiment with divorce reform. Major reforms included changing the grounds for divorce[2] and establishing family courts and conciliation courts. Legislatures hoped that by providing alternatives to litigation, they could encourage reconciliation. States such as Utah, New York, and California adopted counseling programs for families in trouble,[3] programs which could often be consulted where no court action was pending.[4] Legislators and policymakers may have had an altruistic desire to reconcile spouses, but saving money ranked as one of the top reasons for enacting the statutes. Some legislators and taxpayers believed that fewer divorces would mean fewer women and children on the welfare rolls.[5] Ultimately, although many couples used the services, the marital counseling programs remained controversial, were too cumbersome to operate, and did not result in the significant cost savings anticipated.[6]

Despite the perceived failure of the marriage counseling

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1. In 1897, the number of divorces per 100 marriages was estimated to be 2.8, in 1930, 17.4, and in 1950, 23.1. Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 634 (1955-56). *See also* Brigitte M. Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443 (1960-61); Jon M.A. McLaughlin, *Court-Connected Marriage Counseling and Divorce - The New York Experience*, 11 J. FAM. L. 517 (1978-79); David E. Seidelson, *Systematic Marriage Investigation and Counseling in Divorce Cases: Some Reflections on its Constitutional Propriety and General Desirability*, 36 GEO. WASH. L. REV. 60 (1967-68).

2. One of the broadest reforms made to divorce law was the introduction of no fault divorce statutes. By 1982, only two states, South Dakota and Illinois, had fault based divorce statutes. Morris H. Wolff, *Family Conciliation: Draft Rules for the Settlement of Family Disputes*, 21 J. FAM. L. 213, 223 n.52 (1982-83). *See also*, Henry H. Foster, Jr. & Doris Jonas Freed, *Divorce in the Fifty States: An Overview*, 14 FAM. L. Q. 229 (1980).

3. For an overview of some of the programs, see Henry H. Foster, Jr., *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U. L. REV. 353 (1966).

4. Bodenheimer, *supra* note 1, at 445-46. *See also* Neil R. Sabin, *The Family Court Act*, 1970 UTAH L. REV. 106.

5. Bodenheimer, *supra* note 1, at 469. Seidelson, *supra* note 1, at 63 n.7.

6. *See* Foster, *supra* note 3; Dorothy Linder Maddi, *The Effect of Conciliation Court Proceedings on Petitions for the Dissolution of Marriage*, 13 J. FAM. L. 495 (1973-74); Wolff, *supra* note 2. The clash in style between the legal system and the counselors' conciliation styles also created a significant functional problem. Bodenheimer, *supra* note 1, at 466.

experiments, policymakers liked conciliation procedures. Some states repealed the separate marriage counseling infrastructure provisions,[7] but maintained the conciliation provisions.[8] Other states enacted new conciliation statutes.[9] These statutes established conciliation courts that the legislators believed would assist in preserving family life and protecting the welfare of children.[10] The statutes provided for referral of the parties by the court to a marriage counselor.[11] In many cases, the counseling or referral provisions of the statutes included a list of suggested counselors, and the list often included a religious official, such as a priest.[12] By specifically allowing referral to a religious official, the legislatures may have violated of the First Amendment religion clauses.[13] Conciliation statutes played an integral part in divorce reform, and religion can be a strong presence in family life. Determining whether conciliation statutes that provide for court referral to a religious official violate the First Amendment is thus an important question. Further, as alternative dispute resolution (ADR) methods are given increasing play by courts and legislatures, examining potential pitfalls will prevent future problems with other ADR statutes.[14] This Comment will examine the basic framework of the conciliation statutes, apply the basic First Amendment analysis to the "religious official" provisions of those statutes, and suggest an answer to the questions about their constitutionality.

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7. Utah in 1961, New York in 1973.

8. Even Utah re-enacted portions of its marriage counseling act, primarily those sections concerned with conciliation procedures. *See* Sabin, *supra* note 4.

9. These states included Arizona, Iowa, Michigan, Montana, Nebraska, Ohio, and Washington.

10. *See infra* note 44 and Part II.A.1.

11. *See infra* notes 22, 23.

12. *See infra* notes 22, 23.

13. The Illinois Supreme Court has struck down portions of that state's divorce and family court acts on constitutional grounds. In People *ex rel* Bernat v. Bicke, 91 N.E.2d 588 (1950), the Illinois Supreme Court struck down counseling provisions similar to those discussed in this Comment. The court based that portion of its decision on McCollum v. Board of Education, 333 U.S. 203 (1948). *McCollum* struck down a program which allowed public school students to be released from class to participate in religious instruction. *Bernat*, 91 N.E.2d at 595. No other state court has acted similarly, possibly because few individuals have challenged the provisions.

14. Other constitutional challenges to ADR statutes have included challenges based on the Fourteenth Amendment (due process and equal protection grounds); the Seventh Amendment (jury trial right); separation of powers; and federalism concerns. Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989).

I. THE CONCILIATION STATUTES

In states that have enacted conciliation court statutes, the basic framework and procedure is similar.[15] A conciliation or family court act provides for the formation of a conciliation court, generally operating as an arm of the district court.[16] The court is given jurisdiction "[w]henever any controversy exists between spouses which may . . . result in the dissolution . . . of the marriage . . . and there is any minor child of the spouses . . . whose welfare might be affected thereby . . . ."[17] Some states also allow jurisdiction where there is no minor child, if it "appears to the court that reconciliation of the spouses or amicable adjustment of the controversy can probably be achieved, and that the work of the court in cases involving children will not be seriously impeded by the acceptance of the case."[18] Thus, where there is a minor child of the parties, a controversy "shall" be under the jurisdiction of the court (i.e., there is no discretion). Where there is no minor child, the judge exercises discretion and can grant or deny jurisdiction, subject to any other statutory limitations.

A spouse who wishes to take advantage of the conciliation court "may file . . . a petition for conciliation, to preserve the marriage by effecting a reconciliation, or to amicably settle the controversy between the spouses, so as to avoid further litigation over the issues involved."[19] The filing of a petition for conciliation stays any previously filed actions and bars filing of any further action, usually for a period of thirty to sixty

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15. This Comment is not intended to be a survey of conciliation court law in all fifty states. Statutes mentioned are for illustrative purposes only.

16. In some cases, the conciliation court is a subdivision of a family court. In some cases, the former court is independent.

17. NEB. REV. STAT. § 42-811 (1988). Other similar provisions include: ARIZ. REV. STAT. ANN. § 25-381.08 (1991); CAL. CIV. PROC. CODE § 1760 (West 1982); MONT. CODE ANN. § 40-3-111(2) (1991); OHIO REV. CODE ANN. § 3117.08(B) (Baldwin 1991 Supp.); UTAH CODE ANN. § 30-3-16.1 (1989).

18. ARIZ. REV. STAT. ANN § 25-381.20 (1991). Similar provisions include MONT. CODE ANN. § 40-3-111(3) (1991); NEB. REV. STAT. § 42-823 (1988); OHIO REV. CODE ANN. § 3117.08(B) (Baldwin 1991 Supp.). California's law states that the court "shall have jurisdiction . . . whether or not there is any minor child . . . where [the] controversy involves domestic violence." CAL. CIV. PROC. CODE § 1760 (West 1982).

19. OHIO REV. CODE ANN. § 3117.05(A) (Baldwin 1991 Supp). Similar provisions include: ARIZ. REV. STAT. ANN. § 25-381.09 (1991); CAL. CIV. PROC. CODE § 1761 (West 1982); MONT. CODE ANN. § 40-3-121 (1991); NEB. REV. STAT. § 42-812 (1988); N.Y. FAM. CT. ACT § 921 (McKinney 1985); UTAH CODE ANN. § 30-3-16.2 (1989).

days.[20] In some states, even if no spouse files a petition for conciliation, the court may order a conciliation hearing.[21] In addition, the court may recommend or require that the parties see a state-appointed domestic relations counselor, a specialist,[22] or, in some cases, a member of the clergy.[23]

These conciliation statutes recognize that divorcing spouses may need assistance in reaching a settlement. Given the important role that religion can play in family life, and particularly in divorce,[24] it is logical

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20. *See, e.g.*, MONT. CODE ANN. § 40-3-127(1) (1991) which reads: "[d]uring a period beginning upon the filing of the petition for conciliation and continuing until thirty days after the hearing of the petition for conciliation, neither spouse shall file any action for dissolution, declaration of invalidity, or separate maintenance." Arizona's law adds that "upon the filing of a petition for conciliation, proceedings then pending in the superior court shall be stayed." ARIZ. REV. STAT. ANN. § 25-381.18 (1991).

21. *See, e.g.*, CAL. CIV. PROC. CODE § 1771 (West 1982), which reads:

> Whenever any petition for dissolution of marriage . . . is filed in the superior court, and it appears to the court at any time during the pendency of the proceedings that there is any minor child of the spouses, or either of them, whose welfare may be adversely affected by the dissolution of the marriage or the disruption of the household or a controversy involving child custody, and that there appears to be some reasonable possibility of a reconciliation being effected, the case may be transferred to the family conciliation court for proceedings for reconciliation of the spouses or amicable settlement of issues in controversy in accordance with the provisions of this chapter.

22. Experts could include a marriage counselor, a psychiatrist, or other scientific expert. (Nebraska even specifies an endocrinologist. NEB. REV. STAT. § 42-819 (1988)).

23. Utah's law reads:

> The judge . . . may . . . require one or both of [the spouses] to appear before him and . . . require them to file a petition for conciliation and to appear before [a state appointed domestic relations] counselor, or may recommend the aid of a physician, psychiatrist, psychologist, social service worker or other specialists or scientific expert, or the pastor, bishop or presiding officer of any religious denomination to which the parties may belong.

UTAH CODE ANN. § 30-3-17 (1989). California's law requires consent of the parties before referral to a counselor of any kind: "the court may . . . with the consent of both parties to the proceeding, recommend or invoke the aid . . . ." CAL. CIV. PROC. CODE § 1768 (West 1982). Only Utah allows a judge to order referral to a listed counselor, other states follow California's consent provisions.

24. The tenets of many religions set forth procedural and substantive requirements for marriage and divorce. For instance, the Jewish religion has a particular process which the faithful must follow in order to have a recognized divorce. Upon marriage, the spouses sign

that the conciliation procedures outlined above would make some recognition of religion. However, by specifically providing for consultation with religious officials, these statutes raise potential First Amendment problems.

II. THE FIRST AMENDMENT ANALYSIS

The First Amendment of the United States Constitution states in pertinent part that "Congress shall make no law respecting the establishment of religion, nor prohibiting the free exercise thereof . . . ."[25] The first clause, or the establishment clause, prohibits the federal government from making affirmative acts to further or to establish a religion.[26] The second clause, or the free exercise clause, prohibits the government from making laws which interfere with an individual's free exercise of his or her religion.[27]

A state's recognition of the existence of religion or religious organizations is not necessarily unconstitutional; in fact, the free exercise clause may even require recognition in some cases.[28] Nevertheless, in recognizing religion, the government must be careful not to single out a particular religion for recognition, and must also insure against endorsing

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an agreement, called a Ketubah, which provides, among other things, that the parties will abide by Jewish law in the event of a divorce. A Jewish couple wishing to have their divorce recognized by the religious body must appear before a religious tribunal, the Beth Din. Lawrence C. Marshall, Note, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 206-209 (1985). Whether a court can compel an unwilling spouse to participate in the religious procedures raises First Amendment issues. While no federal court has passed directly on the issue, several state courts have required a spouse to participate, using theories of contract law. *Id.* at 205 n.7. In one case in particular, the New York Court of Appeals found specific performance available to one spouse, based upon the Ketubah as contract, allowing the spouse to compel appearance before the Beth Din. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983), *cert. denied* 464 U.S. 817 (1983). States, including New York, have also passed statutes requiring divorcing spouses to remove any bar to the other's remarriage. Marshall, *supra* at 205.

25. U.S. CONST. amend. I.

26. "Congress shall make no law respecting the establishment of religion . . . ." *Id.*

27. " . . . or prohibiting the free exercise thereof." *Id.*

28. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding the application of a state law requiring children to remain in school until age sixteen violative of the free exercise clause where such schooling conflicted with the tenets of the Amish religion); Sherbert v. Varner, 374 U.S. 398 (1963) (finding a free exercise violation in the denial of unemployment benefits to an individual who refused to work on Saturday, her Sabbath). In both of these cases, the state is required to treat an individual differently to accommodate the free exercise of his or her religion.

religion over non-religion.[29] Requiring a party to consult a member of the clergy could rise to the level of an establishment. Alternatively, as discussed below, if the party were unwilling to consult such a religious official, but were required to do so, the requirement could be viewed as a burden upon the free exercise of religion. To determine whether the "religious official" provisions of the conciliation statutes violate either of the religion clauses of the First Amendment, we must examine the applicable law.

A. The Establishment Clause

The establishment clause prevents the federal government from taking action that would serve to favor one religion over another,[30] or to favor religion as a whole over non-religion.[31] Clarifying exactly what that prohibition means, and defining the standard for determining a violation of the establishment clause has produced much scholarship and controversy. One argument holds that the clause requires complete separation, a "wall", between church and state, which would effectively prohibit any interaction. As a general rule, the Supreme Court has not subscribed to this strict separation theory.[32] While strict separation would have the certainty of a bright line test, the idea is not practical. Prohibiting all contact between church and state would create an administrative nightmare, potentially forbidding, for example, firefighters from responding to a fire at a parochial school.[33] Also, a "no contact" test would very likely burden the free exercise of religion. If a church, for example, had no access to government services like fire and police protection, the church would find continued operation quite difficult.[34]

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29. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215 (1961).

30. Everson v. Board of Educ., 330 U.S. 1, 15 (1946).

31. *Abington Township*, 374 U.S. at 215.

32. *See, e.g., Everson*, 330 U.S. 1; Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973).

33. *Everson*, 330 U.S. at 17.

34. The interaction between the two clauses creates tension. Because one clause restricts affirmative establishments and the other clause requires accommodation, the clauses are, at times, unavoidably in conflict. *See, e.g.*, Braunfield v. Brown, 366 U.S. 599 (1961) (holding that orthodox Jewish store owners could not be exempted from Sunday closing laws despite the fact that their religion also required closing on Saturday). In some instances, what is considered a permissible accommodation by some might be considered a de facto establishment by others. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the opening of the legislative session with prayers by a chaplain).

In Sherbert v. Varner, 374 U.S. 398 (1963), the Court held denial of unemployment benefits to be unconstitutional where the state based the denial on the

A second interpretation of the establishment clause proposes that the clause requires the government to remain neutral to religion. What neutrality means, however, is also controversial.[35] Even if one selects a definition of neutrality, it is not easy to determine whether a particular government action is neutral. Although debate continues about the meaning and proper interpretation of the establishment clause, governments and individuals need a standard by which to judge government action. In responding to that need, the Supreme Court, in *Lemon v. Kurtzman*,[36] enunciated a test for determining whether an establishment clause violation exists.[37]

The three part *Lemon* test requires: (1) that a statute have a secular legislative purpose, (2) that it not have the principal or primary effect of advancing religion, and (3) that it not foster an excessive government entanglement with religion.[38] Thus, the test as originally framed includes three steps, or prongs. These steps are commonly referred to as the purpose, effect, and entanglement prongs. Although the Court continues to use the three part *Lemon* test, recent decisions have

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individual's refusal to work on Saturday, her religion's Sabbath. Justice Harlan, in dissent, pointed out that the Court's decision could be viewed an establishment because the individual is only entitled to the benefit because of her religion. However, Justice Harlan found such action to be a permissible accommodation, based on the facts of the case. He made the distinction to emphasize that such action should not always be a required accommodation. *Varner*, 374 U.S. at 422 (Harlan, J., dissenting).

In Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), the Court found an establishment clause violation where a statue required an employer to exempt an individual from work on the employee's Sabbath.

See also, Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

35. *See generally*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1455-1510 (2d ed. 1991). *See also*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986); Gail Merel, *The Protection of Individual Choice, A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Mark V. Tushnet, *"Of Church and State and The Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373; John D. Valuri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986).

36. 403 U.S. 602 (1971).

37. Not surprisingly, the test has been the subject of much discussion and criticism. *See infra* Parts II.A.1 - II.A.3.

38. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and third] the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-613.

suggested that the Court may modify *Lemon*.[39] Because the Court has not expressly abandoned *Lemon*, and because the Court has not yet announced a new test,[40] I will apply the traditional three part *Lemon* test to the "religious official" provisions in the conciliation statutes. However, where appropriate, I will integrate the more recent case law analysis.

1. The "Purpose" Prong

Using the *Lemon* test, the first inquiry made is whether the statute has a secular legislative purpose. As is true in other constitutional law contexts, the Justices on the Supreme Court are divided as to what constitutes an impermissible motive, and how far the Court should go in determining motive.[41] This disagreement is further confused by the fact that very few statutes explicitly state an impermissible motive.[42] Despite,

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39. *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989); Edwards v. Aguillard, 482 U.S. 578 (1987); Witters v. Washington Dep't of Services for Blind, 474 U.S. 481 (1986); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Lynch V. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Mueller v. Allen, 463 U.S. 388 (1983). For a good overview of the test and its evolution, see Carl H. Esbeck, *The Lemon Test: Should it be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513 (1990). *See also infra* Parts II.A.1-II.A.3.

40. A case recently before the Supreme Court, Lee v. Wiseman, 112 S. Ct. 2649 (1992), had been expected to be the vehicle the Court used to alter or reject the *Lemon* test. Wiseman challenged the middle school principal's invitation of a Rabbi to offer prayers at graduation. The Court in *Lee* expressly rejected the "invitation of petitioners . . . and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*." *Lee*, 112 S. Ct. at 2655. However, the Court did not actually use the *Lemon* test to determine the outcome of the case. Instead, the majority focused on what it termed the mandatory nature of the graduation ceremony and on the fact that the principal had given the Rabbi a pamphlet of guidelines for prayer, making the prayer attributable to the state. Justice Scalia, in his dissent, argued that since the majority did not use the *Lemon* test, they were, in effect, invalidating it as a means to measure establishment clause violations. *Lee*, 112 S. Ct. at 2678 (Scalia, J., dissenting). Clearly, the members of the Court have not yet reached a consensus upon how to proceed in establishment clause analysis. Nevertheless, since the Court has not overruled *Lemon*, that test remains appropriate for the analysis presented in this Comment.

41. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (Scalia, dissenting). The case invalidated a Louisiana statute requiring public schools to teach creationism if they taught evolution. Scalia objected to the Court's purpose analysis. *See also*, Hal Culbertson, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915 (1990); Joseph Richard Hurt, *The Use of Endorsement in Establishment Clause Analysis*, 8 MISS. C. L. REV. 1 (1987).

42. Hidden impermissible motive is one of the primary reasons for the effect prong. If the primary and principal effect is to advance religion, an illegitimate purpose can often be inferred.

or perhaps because of this muddying, statutes are very rarely invalidated solely on the purpose prong analysis.[43] Unless a purpose is clearly not secular, the Court has usually found the purpose prong satisfied.[44]

The purpose prong has been subject to the criticism of commentators and Justices alike.[45] One of the main objections to the purpose prong is that, unless a statute expressly states an impermissible purpose, the prong has no function. Often, where a legitimate but pretextual purpose is stated, the effect prong will uncover the impermissible purpose. The purpose prong unnecessarily complicates the analysis. Alternatively, some argue that determining legislative purpose is an unworkable proposition and that the purpose prong is, therefore, unnecessary. Despite these criticisms, and despite some movement away from the purpose prong analysis in recent Court decisions, the analysis has not been abandoned.

The purpose reflected in the conciliation statutes is the promotion and protection of family life, and the protection of children's welfare. The statutes aim to achieve this purpose by effectuating reconciliation or amicable settlement of a controversy whenever possible.[46] Although the belief that the state should encourage family life has its roots in the tenets of any one of a number of religions, that belief is not inherently religious.[47] The establishment clause forbids only statutes whose purpose is to promote religion. In fact, it only forbids statutes whose actual or main purpose is to promote religion. Where the statute's expressed

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43. *But see, e.g., Edwards*, 482 U.S. 578.

44. A statute will be invalidated only "if it is motivated wholly by an impermissible purpose" or if the "pre-eminent purpose . . . is plainly religious in nature." Esbeck, *supra* note 39, at 515 (quoting Bowen v. Kendrick, 487 U.S. 589 (1988) and Stone v. Graham, 449 U.S. 39 (1980), respectively). If promoting religion is some part of the purpose, the statute will probably still be valid. *Id.* at 516 (citing Wallace v. Jaffree, 472 U.S. 38 (1985)).

45. Justice O'Connor's approach may be merging the purpose and effect prongs into a single "endorsement" test. *See infra* Part II.A.2.

46. *See, e.g.*, NEB. REV. STAT. §42-801 (1988) which states:

> The purposes of sections 42-801 to 42-823 are to protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.

47. Esbeck, *supra* note 39, at 532. Esbeck argues that the Court, in its establishment clause analysis, distinguishes between laws which directly promote religion (like requiring the teaching of creationism) and those which, while they may have once been religiously motivated, have their basis in general morality (like criminal murder statutes). He argues that the purpose and effect prongs "are materially stiffened or relaxed . . . depending upon whether the challenged statute is, or is not 'inherently religious.'" *Id.* at 532.

purpose happens to coincide with a religious belief, there is no violation so long as that purpose is not solely religious. A common sense example would be a statute criminalizing murder. One could argue that the foundation for such a statute is a religious belief that murder is immoral. Nevertheless, few would argue that the belief is inherently religious - it has become part of the moral fabric of society in general. Thus an invalid purpose would only exist if the belief upon which the statute is based is inherently religious, or if promoting religion were the motivating goal of the statute.

The "religious official" provisions in the conciliation statutes are not inherently religious. They do coincide with religious belief, but there are secular motivations for the provisions as well. A legislature could well believe that the aim of the statute would not be reached without providing an avenue for religious counseling for those who wish it. The cost justifications mentioned at the beginning of this Comment, whether one agrees with their premise or not, can also be classified as secular motivations. The Court has not been exacting in requiring a strong secular motivation. Since the primary motivation, reconciliation, can be considered as a secular one, there is little doubt that the "religious official" provisions would pass the purpose prong of the *Lemon* test.

2. The Effect Prong

Although a statute may have a permissible purpose, it may still fail the second prong of the *Lemon* test. A statute must not have the principal or primary effect of advancing religion. However, what is a principal or primary effect? This question makes the effect prong the most difficult of the three prongs of the *Lemon* test. Also, this analysis has undergone the most modification.[48] To understand what constitutes a principal or primary effect, it is helpful to examine what does not qualify as such an effect.

If a statute has only the incidental effect of advancing religion, the effect prong is not violated.[49] The Court has found the effect to be only incidental where a city included a creche (nativity scene) in a larger

48. *See supra* note 39. *See also*, Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987).

49. Bowen v. Kendrick, 487 U.S. 589 (1988).

holiday display;[50] where a state allowed a tax deduction for tuition, textbooks, and transportation for parents of all primary and secondary students;[51] and where a statute allowed funding to religious organizations (among others) to counsel teenagers.[52]

It may be that the principal or primary effect of advancing religion will only occur if the government gives a benefit directly to a "pervasively sectarian" institution.[53] The Court, narrowing the reach of the effect prong, has said that such an institution would be one "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[54] In addition to narrowing the definition of institutions whose actions are expected inherently to promote religion, the Court also has focused recently on state versus individual control.[55] Where the direction of the funds is controlled by individual choice, and not by government fiat or encouragement, there is not the principal or primary effect of advancing religion. This analysis holds true even if the aid eventually flows to a religious organization and even if the aid may actually promote religion in some incidental way.

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50. Lynch v. Donnelly, 465 U.S. 668 (1984). The Court found that the context, i.e. the inclusion of a santa, reindeer, and a seasons greetings banner, diffused the religious message of the creche.

51. Mueller v. Allen, 463 U.S. 388 (1983). The Court found that by allowing all parents the deduction, the statute placed the choice of schools in the parents' hands. A parent could choose to send a child to a religious school or not, the state did not encourage or discourage either choice. Aid did not flow directly to the religious institution from the state, but would do so only as a result of the individual choices of the parents.

52. *Bowen*, 487 U.S. at 605-15. The Court indicated that there was nothing "inherently religious" about the counseling services, even though the approach "may coincide with the approach taken by certain religions." *Id.* at 607. Additionally, the Court found it "quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life." The Court further stated that "[t]o the extent that this congressional recognition has any effect of advancing religion, the effect is at most 'incidental and remote.'" *Id.*

53. Esbeck, *supra* note 39, at 522-25.

54. *Bowen*, 487 U.S. at 610 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

55. *See supra* note 51. *See also* Witters v. Washington Dep't of Social Services for Blind, 474 U.S. 481 (1986) (holding that a statute authorizing payment to a handicapped individual for vocational rehabilitation services did not violate the establishment clause where the individual planned to use the funds to train as a minister. The Court focused on the individual choice of how the funds would be used, finding that the statute did not encourage sectarian education.); Esbeck, *supra* note 39, at 525-527, arguing for the emergence of a "facial-neutrality, private choice" analysis. Esbeck argues that where a statute simply allows some benefit to an individual who is advancing an "independently chosen religious objective," the Court will not find a violation. He argues further that this analysis is an "adjustment to modernity," and that to exclude such choices would be hostile to religion, potentially creating a free exercise problem. *Id.*

Another important modification of the effect prong is Justice O'Connor's endorsement analysis.[56] O'Connor asks whether the government action has the "effect of communicating a message of endorsement or disapproval of religion."[57] It is not entirely clear whether O'Connor's endorsement test will prevail, nor is it clear exactly what effect it will have on the *Lemon* test. However, it is important to analyze the conciliation statutes under all of the above variations of the effect prong.

Two points are important to note at the outset. First, the "religious official" provisions of the conciliation statutes are not funding provisions and therefore are not directly analogous to similar cases cited above.[58] Second, except for Utah, the statutes require consent of the parties before referral to a counselor is permitted.[59]

In *Bowen v. Kendrick*, the Court upheld a statute that allowed grants to religious institutions for counseling services under the Adolescent Family Life Act (AFLA).[60] In *Bowen*, the issue was the funding of the counseling. Counseling teenagers regarding pre-marital sexual relations and teen pregnancy was the aim of the AFLA at issue in *Bowen*. The statute also placed prohibitions on certain activities, for example, the giving of information promoting abortion as an option. These prohibitions tracked clearly the tenets of some religions. The Court held that the effect of advancing religion was "at most incidental and remote," finding reasonable Congress' recognition of the influence of religious organizations on family life.[61] Although funding is not an issue with the conciliation statutes, the effect prong analysis should proceed in the same manner as in *Bowen*.

The "religious official" provisions of the conciliation statutes also involve counseling. This counseling is likely to coincide with the tenets of whatever religion the counselor represents. Following the Court's reasoning in *Bowen*, however, such counseling would similarly have only the incidental effect of advancing religion since, arguably, the purpose is

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56. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring).

57. *Lynch*, 465 U.S. at 692.

58. In fact, most expressly prohibit the use of state funds. For example, Montana's law states: "[s]uch aid, however, shall not be at the expense of the court or the county, unless the county commissioners of the county specifically provide and authorize such aid." MONT. CODE ANN. § 40-3-125 (1991).

59. See the Utah statute, *supra* note 23.

60. The Court upheld the statute on its face, but remanded for a determination of its constitutionality "as applied." *Bowen*, 487 U.S. at 622.

61. *Id.* at 607.

still the secular one, and any advancement of religion is only a by-product of reaching the secular goal. Also, the fact that consent is required before referral is allowed would follow the individual choices rationale espoused by Justice Rehnquist in *Mueller v. Allen*.[62] Even where the court can order a couple to see a counselor,[63] it is unlikely that the Court would view the provision as having the principal and primary effect of advancing religion, since even if the parties are compelled to receive counselling, they are in no way compelled to accept any proposals made by the counselor. The statutes require only that the parties attempt reconciliation. Any reconciliation is arguably of the parties' free will. Further, if prohibiting counselors who receive AFLA funds from discussing abortion is not a violation, it is difficult to see how allowing religious officials to perform marriage counseling would be otherwise, even if it were compelled.[64]

Even using Justice O'Connor's endorsement analysis, it is difficult to see how the religious official provisions would fail the effects test. Although it may be a stretch, one can analogize to *Lynch v. Donnelly*.[65] In *Lynch*, the Court found the presence of an undeniably religious symbol, a nativity scene, acceptable based on the context and the total message. The nativity scene was amongst other "secular" symbols, such as a Santa and reindeer. Here, a religious official is but one of a number of alternative counselors listed in the statute. One could argue that any endorsement is lost where the religious official is grouped with many other types of counselors, and that the inclusion of a religious official is a permissible accommodation.

Although it is certainly plausible to argue that by including a religious official amongst the counseling choices, and providing the conciliation forum to such an official, the state is promoting religion, it appears that such an argument would fail with today's Court. Given the reasoning in cases like *Mueller, Bowen* and *Lynch*, it is likely that whatever effect might occur, it would be considered incidental.

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62. 463 U.S. 388 (1983). *See supra* note 51.

63. Such an order is only possible in Utah.

64. It might, however, raise a free exercise problem. *See* discussion *infra* Part II.B. In addition, it is possible that a judge's recommendation to see the counselor might carry significant authority and might be sufficiently influential to be considered coercive. Seidelson, *supra* note 1, at 62. Carrying that argument further, the pressure to undertake conciliation might be interpreted as pressure to settle the controversy.

65. 465 U.S. 668 (1984).

3. The Entanglement Prong

The final prong of the *Lemon* test requires that the statute in question not foster an excessive entanglement with religion. In the past, entanglement has been subdivided into two categories, political and administrative.

Political entanglement exists when a statute causes political divisiveness along religious lines. This divisiveness does not mean ordinary and valuable disagreement, but instead means causing a candidate to expressly align with a religious group, or forcing voters to vote based upon religious considerations. With the Court and many commentators questioning whether a political divisiveness inquiry might impinge upon the speech protections of the First Amendment, the Court has not recently focused on this category in its analysis.[66]

Administrative entanglement exists where a statute requires the government to become enmeshed in a religious institution's affairs, or allows a religious organization a place in government decisions. The prohibition of administrative entanglement embodied in the entanglement prong is intended to protect both the church and the state.

In *Aguilar v. Felton*, the Court struck down a statute that provided funds and services to parochial students in their schools.[67] The Court found that the supervision which was necessary to prevent use of the program to inculcate religious beliefs "inevitably result[ed] in . . . excessive entanglement."[68] However, in *Bowen*, the Court found no excessive entanglement in the monitoring of grants.[69] The Court saw "no reason to fear" undue government intrusion on the day-to-day activities of the religious organizations.[70]

An analysis of the conciliation statutes suggests the same conclusion. No funding is required, and the court performs no direct supervision of the counseling. The "religious official" provisions are more like those at issue in *Bowen* than those in *Aguilar*. The conciliation court would not be involved in the counseling in any more of an intrusive manner than the government would have been with the AFLA counselors. Further, the lack of direct funding makes the relationship even more distant. Although it is possible to argue that government supervision would be necessary to prevent the use of counseling to inculcate religious

66. Esbeck, *supra* note 39, at 528-29.

67. 473 U.S. 402 (1985).

68. *Id.*

69. *Bowen*, 487 U.S. at 616.

70. *Id.*

beliefs, it is likely that the Court would find less risk of inculcation with adults in marital counseling than with school age children.

The other potential entanglement risk is the risk that the church may become entangled in government affairs. It is possible that any agreement of the parties may be reduced to writing,[71] although no such action is required by the statutes. But, if the agreement were reduced to writing and submitted to the court, one question which might arise is whether the religious official is intruding on the province of the judiciary.[72] This argument is plausible, but could be rebutted using the individual choice argument from Justice Rehnquist's opinion in *Mueller*.[73] The *Mueller* argument can be used to analyze potential church usurpation of the state's role in the same way Justice Rehnquist used it in *Mueller* itself. So long as any agreement resulting from the marital counseling by a "religious official" is considered the product of the parties' free choice, it is hard to see how the church could be any more entangled in government affairs than the government was entangled in church affairs in *Mueller*.[74]

Thus, despite the potential establishment clause problem, as the discussion above indicates, the "religious official" provisions of the conciliation statutes should pass muster under the *Lemon* test, including any modification from recent case law. However, one other potential problem exists, conflict with the free exercise clause.

B. The Free Exercise Clause

The free exercise clause prohibits the government from interfering with an individual's free exercise of his or her religion. Generally, the government must not enact laws that force an individual to choose between adhering to the tenets of his or her religion and obeying the law.[75] Exactly what government action will rise to the level of an unconstitutional violation depends to a large extent upon the government's interest and the

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71. Nebraska's law reads as follows: "[a]ny reconciliation agreement between the parties may be reduced to writing and, with the consent of the parties, a court order may be made requiring the parties to comply therewith." NEB. REV. STAT. § 42-820(1) (1988).

72. The Iowa Supreme Court has determined that an opinion by a clergy member functioning as a conciliator did not usurp the judicial function. *In Re* Marriage of Boyd, 200 N.W.2d 845 (1972). A court could view the clergy member as acting upon the wishes of the couple and not acting to advance a religious belief.

73. *See supra* notes 51, 62, and 63 and text accompanying.

74. Again, however, one could make the same authority figure argument about the religious official as was made about the judge, *supra* note 64. *See also supra* note 72.

75. Sherbert v. Varner, 374 U.S. 398 (1963).

exact nature of the choice required by the statute. The free exercise of religion must be burdened before a violation can exist. Once a burden exists, the Court has required a compelling state interest and a close nexus between the means and ends to allow the state to take action which may infringe upon an individual's right.[76] However, more recent decisions indicate the possibility that the Court may be lowering the level of scrutiny.[77]

In the seminal case of *Sherbert v. Varner*, the Court found a free exercise violation where the state forced the individual to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[78] This language delineates an essential element of the free exercise analysis; there must be a burden on the free exercise of religion.

However, the Court recently narrowed the burden determination. In *Lyng v. Northwest Indian Cemetery Protective Association*,[79] the Court found no burden on free exercise where the government planned to build a logging road through the historical sacred areas of the Indians. Justice O'Connor explained that the free exercise clause is intended to protect individuals from forced violation of religious beliefs. The clause does not prohibit "incidental effects . . . which may make it more difficult to practice certain religions but which have no tendency to coerce."[80] What this decision may mean is that only a statute which requires a direct choice between breaking a law or breaking a religious tenet will create a free exercise burden.

If a challenger can establish a burden, then the next issue, that arises is what interest the government can show. Until the Court's recent decision in *Employment Division, Department of Human Resources v. Smith*,[81] the government has been required to show a compelling interest.[82] In *Smith*, Justice Scalia used what is essentially a rational basis test to uphold a denial of unemployment benefits based on a violation

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76. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972).

77. Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). There, the majority opinion, written by Justice Scalia, did not use the compelling interest test.

78. *Sherbert*, 374 U.S. at 404. *See also supra* note 28 and accompanying text.

79. 485 U.S. 439 (1988).

80. *Id.* at 450-451.

81. 494 U.S. 872 (1990).

82. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986); United States v. Lee, 455 U.S. 252 (1982); Sherbert v. Varner, 374 U.S. 398 (1963).

of a state criminal law.[83] It is not clear whether this case is an aberration, a dramatic change in analysis, or might be distinguishable on its facts. It is also worth noting that Justice O'Connor would have reached the same result using the compelling interest test.[84]

In analyzing the "religious official" provisions of the statutes, one major clarification is relevant. Those statutes that require consent before referral simply pose no free exercise problem. There is no burden of any kind if the action is not required and nothing is withheld as a result of not choosing to see a religious official.[85] In the case of a statute like the Utah statute, however, a free exercise problem might arise.[86]

The first question to ask in analyzing the statute is whether any burden is placed on the free exercise of religion. In a case where one spouse wants conciliation and the other does not, or where a judge orders both to submit to conciliation, obviously the counseling is compelled. Given *Lyng*, however, it is difficult to see how compelling counseling would create a burden. A spouse is not forced to choose between exercise of her religion and adherence to the law. Even where someone is not religious, the counselor is purportedly serving a counseling function little different from a secular counselor.[87] Nothing in the compelled counseling requires that an individual agree to accept or renounce any beliefs, and once it is determined that reconciliation will not occur, the divorce action again becomes available to that individual.

Assuming, however, that there is a burden, and further, that the compelling interest test applies, is the "religious official" provision allowable? It could be argued that a less burdensome means for achieving the statutes' purpose would be to restrict the list to secular counselors. If the list is not so restricted, the inference is that the interest is not

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83. Smith, a counselor at a drug rehabilitation clinic was fired from his job for ingesting Peyote, a controlled substance. Peyote is part of the religious ritual of the Native American Church, of which Smith was a member. Smith used Peyote solely as part of a religious ritual. The Court held that denial of job benefits based on the violation of a criminal law of general applicability did not violate the free exercise clause.

84. *Smith*, 494 U.S. at 891 (O'Connor, J.,concurring).

85. Although *see supra* notes 64 and 74.

86. It is interesting to note that an original Washington statute did not allow the judge to order consultation because of First Amendment concerns. The statute was later amended to allow the judge to compel counseling. Luvern V. Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375, 384 (1974). The Washington statute was repealed in 1991.

87. The reverse argument could be made regarding a very religious individual sent to a psychiatrist instead of a religious official. It is doubtful that the Court would find a free exercise violation since it has said that the state is not compelled to take affirmative action to help an individual exercise his or her religion.

compelling since it could be achieved in other less burdensome ways. However, even prior to *Smith*, the Court has been reluctant to find a failure of the compelling interest where the legislature asserts one.[88] In this case, it is possible that the legislature could show that because of the presence of religion in family life, a full achievement of purpose would not be possible without providing the choice of a religious official as a counselor. Such an argument should fulfill a compelling interest analysis and override the burden on free exercise. Consequently, the statute would pass constitutional scrutiny. Under *Smith*, all that would be necessary is a rational basis for the provision, clearly present in the legislatures' avowed purpose and the religious nature of our society.

Again, despite the potential for a free exercise clause violation, it is unlikely that conciliation statutes would be deemed unconstitutional under even traditional free exercise analysis. Under the arguably more relaxed standards of recent decisions, there is little likelihood that conciliation statutes would be declared unconstitutional.

III. CONCLUSION

As I have discussed, the religion clauses of the First Amendment present a potential problem for divorce conciliation statutes in several states. An examination of the establishment clause and free exercise clause analysis, particularly in light of recent case law, shows that "religious official" provisions are constitutional. This result is important in fashioning further ADR statutes in family law, as well as in other areas of the law.

Despite the apparent ease with which these provisions passed the First Amendment analysis, it is important to be aware of the demands of this and other provisions of the Constitution when establishing ADR statutes. Becoming embroiled in a legal dispute over the constitutionality of the ADR statute would be a great disservice and a great irony.

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88. *E.g.*, United States v. Lee, 455 U.S. 252 (1982); Braunfield v. Brown, 366 U.S. 599 (1961).